IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

NORTHERN PACIFIC RAILWAY COMPANY,
Petitioner,
vs.
LOUISE H. ADAMS and FRANK H. ADAMS.

On Petition for Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR LOUISE H. ADAMS AND FRANK H. ADAMS IN OPPOSITION TO THE PETITION.

STATEMENT.

Jay H. Adams, the deceased, on the 13th day of November, 1898, went from Spokane, Washington, his home, to Hope, Idaho, and was returning therefrom in the afternoon of the same day, on a regular passenger train of the Northern Pacific Railway Company. The train left Hope at 4.15 p. m., being three hours and ten minutes behind time. (Train schedule marked Ex. A6, and Trans., p. 312.) The train consisted of a mail car, baggage car, express car, smoking car, first-class day coach, tourist sleeping car, dining car and Pullman

sleeper, placed in the train in the order named. The cars in the train occupied by passengers were vestibuled throughout with the exception of the tourist sleeping car, neither platform of which was vestibuled, nor were the sides of the platforms of the said tourist sleeping car enclosed by means of gates, rods, chains, or any other device, but were entirely open, permitting unobstructed ingress and egress to and from such platforms. (Trans., pp. 84, 85, 86.) A tourist sleeping car was customarily carried on the through passenger trains (Trans., p. 392) of which the train in question was one, and the platforms of all such tourist cars were open and unguarded, as were those of the car in this train, the company having no tourist sleeping cars with vestibuled platforms. (Trans., pp. 392, 649.) While customarily carrying a tourist sleeper in its trains, with such open and unguarded platforms, the company advertised to the public in three newspapers published in Spokane, all of which were taken and read by the deceased, including the advertisements, that its trains carried a dining car for the use of passengers, and a tourist sleeping car, and were entirely vestibuled throughout. These advertisements had appeared for months prior to the 13th day of November, 1898. (Trans., pp. 271, 272, 273, 280-283, 212, 213.)

The deceased boarded the train at Hope, at the front end, by getting upon either the rear end of the smoking car or the front platform of the adjoining first-class day coach, both of which cars were vestibuled, and proceeded immediately forward in the smoking car, and took

his seat in the front part of it, being accompanied by a friend with whom he was traveling. (Trans., p. 89.) And here it is proper to call attention to a misstatement of fact on the part of petitioner. On page 4 of its brief it is said:

"It is an established and uncontradicted fact that "they (referring to the deceased and a friend) got on to "the train by one of the unvestibuled platforms."

Mr. Gabbert, the friend of the deceased, swore positively that he and the deceased got on the train between the day coach and smoking car (Trans., pp. 89, 95), and he remembered that the day coach was vestibuled, and he did not remember as to the smoking car. (Trans., pp. 95, 98.) It is an admitted fact in the case that both smoking car and day coach were vestibuled. (Trans., p. 85.) It is apparent, therefore, that the deceased and Mr. Gabbert boarded the train by a vestibuled platform, that it was not admitted to the contrary, and that the above quoted statement is not correct.

Very shortly after the train started, and before any unusual speed had been attained, the deceased left the smoking car to go to the dining car to get some good cigars for himself and friend. (Trans. pp. 90, 91). The deceased did go to the dining car and did purchase cigars, and after doing so left the dining car, in the direction of the smoking car and the friend with whom he was traveling. (Trans. pp. 481, 484, 60, par. 7.) The dining car conductor saw him leave the dining car, and that was the last time he was seen alive by any person.

Very high speed was commenced about the west end of the Pack River trestle, reaching at the point where the body was found about sixty miles an hour. (Trans., pp. 104-106, 116-121, 126-134, 94, 95.)

The deceased could not be found when the train reached Spokane. Search being instituted, his body was found, on the next day, lying on the rocks opposite a six degree curve in the track about six miles and 2,100 feet west from Hope (Trans. pp. 190, 191), and one mile and 3,480 feet from the west end of the Pack River trestle. (Trans. pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180.) The plaintiffs are the widow and son of the deceased. (Trans. pp. 205, 209.)

BRIEF.

I.

The Questions raised by Petitioner and decided below are not Proper Questions to be brought to this Court by Certiorari.

We submit that this case is not one of those which, in the language of Mr. Justice BREWER, in Forsyth v. Hammond, 166 U. S., 512, "Involve questions of such "public and national importance as to require that a "consideration and determination thereof should be "made by the supreme tribunal of the nation." The questions raised by petitioner relate, (1) to the construction of local statutory law—that is to say, of two state statutes; (2) to the interpretation of the meaning of a written contract between two parties; (3) to

the sufficiency of the pleading, or complaint; (4) to whether certain acts alleged as negligence under the circumstances of this particular case, should have gone to the jury, or have been decided by the court as a question of law; (5) to whether there was sufficient evidence to go to the jury on the question of fact as to what caused the death of the deceased; (6) to the court's refusal to admit certain evidence which it was contended would show that petitioner was not guilty of negligence.

It seems clear to us that these questions have the very character of the questions which the act of March 3, 1891, was passed to relieve this court of, and which that act, as interpreted by this court, contemplated the lower courts might safely be permitted to decide.

Ex Parte Woods, 143 U. S., 202.

It is suggested by the petitioner that in eight states, besides Idaho and Washington, there are statutes providing for actions for death by wrongful act, from which legislatures have seen fit to omit certain language omitted from the statutes relating to this subject of Idaho and Washington. What other resemblances there are between the local statutes of these several states besides the omission of the specified language, petitioner does not point out, if there are any, nor indicates whether the resemblances between these various state statutes are so marked that the interpretation of one would be a rule competently interpreting all. But if the far presumption might be indulged that each state's statute would not have to be interpreted by a close scru-

tiny of the exact phraseology of each, yet it is submitted that the interpretation of each state's statute is a local matter and not one for which this court is called upon to establish a general rule of decision. It is not urged in this connection, by petitioner, that these statutes are in conflict with constitutional provisions, nor is any other reason asserted making the interpretation of these state statutes peculiarly within federal jurisdiction. It is the duty and right of each state to interpret, by its own highest tribunal, its own statutes. It is not even asserted by the petitioner that in these many states such interpretation has not been had and a satisfactory rule established. The rule seems well settled that the federal courts within such states would be governed by the interpretation of their statutory law by the state supreme courts. If such interpretation has not been had by each state, a general rule laid down by this court, we submit, would not preclude the supreme tribunal of each state from establishing its own interpretation of the state's statute irrespective of the conclusion reached in that regard by this court. It is not asserted, nor is it the fact, that the state of Washington, or the state of Idaho, has given an interpretation to these statutes in conflict with that in which the two courts below have concurred. We submit, therefore, that though many states have such statutes, the question of their interpretation is not of "such public and national importance" as to put in operation the extraordinary jurisdiction of this court that is now invoked.

The other important question in the case which is raised by petitioner, though not important in connection with the exercise of the jurisdiction of this court, is the interpretation of the written contract between deceased and petitioner. The intent and meaning of the parties to the written contract is to be sought for and found in the language of the instrument and the surrounding circumstances, that is, by the ordinary and time worn rules, the same in all courts, for the interpretation of contracts. We submit that the application of these fixed rules to this written instrument is properly with the courts below, and that the correct application of the rules of law involved and the meaning of this particular written instrument are not of such general importance as to make the question an appropriate one to be brought to this court on certiorari. The question here is simply one of interpretation—what did the parties to the contract intend as shown by the writing?

The actual thing which this court is asked to do, and which it is asked to exercise this unusual jurisdiction to enable it to do, is to write into the laws of the two states a term not put there by the legislatures which made them, and into the written contract a term not put there by the parties which made *it*, and this extraordinary jurisdiction is invoked and these extraordinary things are requested all to the end that this common carrier may kill a citizen with impunity under circumstances which, measured by the ordinary standards of

human conduct and the ordinary rules governing in all courts, will constitute negligence.

The effort to force an additional term into these statutes is made also in the face of the ruling of this court in Louisville, E. & St. L. R. Co. v. Clark, 152 U. S., 240, where, construing a statute giving a right of action for death by wrongful act, this court, by Mr. Justice HARLAN, said:

"The statute imposes no other condition upon the "right to sue. The court has no authority to impose "an additional or different one."

The effort to instil doubt into this court's mind as to the correctness of the judgments in this cause in the courts below, by pointing to a supposed defect in the pleadings, namely, to the failure to plead in the complaint the statute of Idaho, and to the failure to introduce the same in evidence, hardly merits special reference. We do not think that a defect in the pleading, or even an insufficiency in the proof, will be deemed of such great and general importance as to be a proper basis for an application to this court for its writ of certiorari. This thought is accentuated by the fact that the omission of the statute from the pleading was not complained of in the trial court by demurrer or otherwise. It is further emphasized by the fact that such a defect in the pleading would not be noticed by this tribunal even in the exercise of its ordinary jurisdiction on appeal or writ of error.

Railroad Company v. Lindsay, 4 Wallace, 650.
Van Ness v. The Bank, 13 Pet., 17.
Ewing v. Howard, 7 Wallace, 499.
Allend v. Spokane Falls etc. Co., 21 Wash., 324.

The whole criticism in this regard is rendered idle by the fact that the federal courts will take judicial notice of the laws of the several states and administer them without their being pleaded or offered in evidence.

Owings v. Hull, 9 Pet., 607.
Covington Drawbridge Co. v. Shepherd, 20 How., 227.
Lamar v. Michou, 114 U. S., 218.

It is intimated by the petitioner that the Circuit Court of Appeals, in its ruling that the contract made by the deceased does not bind the plaintiffs, is in conflict with the ruling of the Supreme Court of the state of Washington in the case of Muldoon v. Seattle City Railway, 7 Wash., 528; 10 Wash., 311. A glance at that case, however, immediately discloses the entire absence of any possible conflict between it and the ruling of the Circuit Court of Appeals in the case at bar. In that case the party who had made the contract with the carrier was not killed, but himself brought the action against the company for the personal injuries inflicted. The question, therefore, of the effect of such an agreement where death had been caused and suit instituted by the heirs for their own loss, could not have been, and was not touched upon in that case. Furthermore, in-

asmuch as the party injured brought the suit himself, the question whether such an agreement *also* exempted the carrier from liability for *death* could not have been, and was not raised or decided. Hence, that case has no bearing whatever on the questions presented by the petitioner.

It is further urged by the petitioner that the writ must issue in the interest of uniformity of federal decision, it being alleged that the ruling of the Circuit Court of Appeals of the Sixth Circuit, in the case of Sansom v. Southern Ry. Company, 111 Fed., Rep., 887, is in conflict with the ruling of the court below, which latter permitted the presence of a car in the train unvestibuled *and* unguarded at the sides of the platforms so as to prevent passengers falling therefrom, to be considered by the jury in determining whether, under all the circumstances of this particular case, the petitioner was guilty of negligence. (Trans., pp. 807, 808, par's 20, 22.) There is no conflict whatever between the Sansom case and the case at bar. In the Sansom case there was no dining car carried in the train, constituting a standing inducement and incentive to all the passengers to go from one car to another. There was no standing invitation to all the passengers to use at all times another car than that they rode in, and there was an entire absence of the obligation on the carrier (present in the case at bar) to arrange the diner and the train so that the diner might be *safely* used in the manner directed by the carrier and for the purposes for which the carrier invited the

passengers to use it. There was no element of negligence whatever shown in the Sansom case, except the absence of the vestibule; while in the case at bar it was alleged and shown by the proofs that while carrying a diner, with a standing invitation to the passengers to use it and to pass to and from it at all times, a car was sandwiched in the *middle* of the train, which might have been carried at either extreme end (Trans. pp. 531, 532, 554, 249), being unvestibuled *and* with the sides of its platforms entirely unguarded so as to prevent passengers falling therefrom as they passed over the platforms to and from the diner (Trans., pp. 84, 86), and that, charged with the knowledge that passengers would be acting on the invitation and passing to and from the diner over these unguarded platforms, the petitioner ran its train at an excessive rate of speed around an exceedingly sharp curve. (Trans., pp. 104-106, 116-121, 128-134, 94, 95, 189-192, 142, 145, 149, 150, 187, 188, 175-180, 303.) It was further proved in the case at bar that the higher the speed the greater the jolt at the sharp curves (Trans., pp. 660-663), and that, charged with the knowledge that at any sharp curve its invitation was being acted upon by its passengers and that they were passing to and from the diner over the unprotected platforms, while running the train at about sixty miles an hour the air brake was not applied at the particular sharp curve where the deceased was thrown from the train. (Trans., pp. 351, 354.) It was further proved that it was customary and proper at sharp curves, when the train was running at high

speed, to apply the air brake, to the end that the jolt or jar at such curves would be moderated, and that such was the effect of the air brake when applied under such circumstances. (Trans., pp. 351-354.)

These facts show the sharp distinction between the Sansom case and the case at bar. They further show the assertion by petitioner, that the only negligence alleged in the case at bar was high speed and absence of the vestibule, is markedly incorrect. The absence of the vestibule could not be considered as the negligence in the case, standing separate and alone as an isolated fact, nor was it so presented to the jury. It was presented by the court's charge to the jury in connection with the carrying of the diner, in connection with the position of the unvestibuled car in the train, in connection with the absence of "railings, rods, chains or gates to enclose the platforms," and "under the circumstances." The quoted matter is from the court's instructions Nos. 22 and 20. (Trans., pp. 808, 807.)

Furthermore, the absence of the vestibule and other guards at the sides of the platforms was pleaded as an element of negligence (Trans., pp. 16, 17), and the evidence of it was introduced in support of the pleading with the consent of petitioner and without any objection made to its introduction. (Trans., pp. 84-87.) In the stipulation putting this matter in evidence, petitioner reserved the right to object if it wished to, but never did so. It would seem entirely too late for petitioner to complain of the court's telling the jury that they might consider the

evidence which the petitioner itself had thus consented might be given to them for their consideration.

1 Thompson on Trials, § 700.

On page 16 of its brief, the petitioner asserts that "This case is like the Voigt case" (176 U. S., 498), and further asserts, *without showing or suggesting that any relation of master and servant, or of fellow servants, exists in the case at bar*, and notwithstanding that there is no such relation in the case (the deceased not being employed by petitioner directly, indirectly or by possible inference), that the law of fellow servants should govern here. This latter assertion is not much more extravagant than the many propositions urged, but we believe this statement will dispose of it.

In regard to the Voigt case the distinction is immediately obvious. The plaintiff in that case was an express messenger, carried by the railroad to care for express matter, under a contract between the railroad and the express company. The court held that, in effect, Voigt was a co-employe of the other employes of the railroad, he holding, in his work and duties and place on the train, substantially that relation to them. The near analogy between his position and that of a servant injured by the negligence of his fellow servants is forcibly depicted, and, upon the theory of the freedom of the master from liability for the injury to one servant by the negligence of co-servants, the railroad was held to have competently made its contract exempting itself from liability for negligence of its servants. The

court's language is very explicit in pointing this analogy, and it lays great stress on language equally clear, of a similar tenor, used in other cases and particularly in Bates v. Old Colony R. Co., 147 Mass., 255. The court further intimated that Voigt was a part of the express company, which was in effect being carried, and that the express company was a common carrier, and that it was not the duty and function of a common carrier to carry common carriers, and hence, in carrying the express company or its representative on the train, acting as the express company, the railroad was not a common carrier. The court further carefully differentiates Voigt from a passenger by showing that he was carried, not among the passengers, though on a passenger train, but on a car specially constructed for express matter, to handle and care for matter transported during the period of transportation, doing work similar to that done by employes, and was not carried for the purpose of transporting him from one point to another; in all these particulars bearing a close resemblance to an employe and that thus he was not within the definition of a passenger. These conditions, *all absent from the case at bar*, most radically distinguish the two. In the Voigt case the party who made the contract was not killed, but himself brought the suit for the personal injuries, while in the case at bar the party who made the contract *was* killed, and the suit was brought by his heirs, under a local statute, for his *death* and the consequent injury to themselves. Even the element of free carriage did not enter into the Voigt

case, inasmuch as, as explained in the Lockwood case (17 Wall., 357), Voigt's "passage was one of the mutual terms of the arrangement for carrying" the express matter, and, therefore, Voigt was carried for hire.

As a ground for the issuance of the writ by this court, the charge made by petitioner of error by the trial court in ruling out the pass and contract when offered in evidence, the materiality of the evidence, as *now* explained, being to show that the petitioner owed the deceased a less degree of care than that owing a passenger, and so tending to prove that the petitioner was not guilty of negligence, is of but slight importance we think and wholly inadequate. Even though the question were of sufficient importance, the evidence was clearly not competent. But were it otherwise, there is a factor in the case in connection with the offer of this evidence which, we submit, should cause reluctance on the part of this court to exercise its extraordinary jurisdiction to aid the petitioner in this behalf. When the counsel for petitioner, having in mind the subtle and refined use and object for which it was intended, as *now* explained, offered this pass and contract in evidence, the court had theretofore, in that trial and the prior one, shown that he knew of no ground for its introduction (Trans., pp. 40-44), and counsel for plaintiffs knew of none. Under these circumstances counsel for plaintiffs asked the counsel for the petitioner what the object of the offer was, and counsel for petitioner preferred to keep the very ingenious theory of its alleged effect, *now* presented, to himself, and refused to state

the object, evidently to get error in the record for appellate purposes purely. (Trans., pp. 784-786.) We can conceive of no other object for this secrecy. Thus the court below, by petitioner's affirmative effort to that end, was deprived of the opportunity to keep the record straight in that regard, if the evidence *was* competent. From the nature of the transaction it would appear, if the ruling *was* wrong, that petitioner *intended* that the court should rule wrong and that plaintiffs should not have the information which might enable them to correct it.

We submit that, in this particular, the petitioner is so far the author of any injury that may have resulted to him in connection with the ruling out of this evidence that this court will not put in force its extraordinary machinery and assume the burdens of reviewing this case for petitioner's relief. (For discussion of contract and pass as evidence see pp. *41-48 infra.*)

In keeping with the general unsoundness of petitioner in this application is his reasoning relative to the alleged inconsistency of the trial court in instructing the jury that contributory negligence by deceased would bar the action. There was no inconsistency whatever between the position of the courts below that the plaintiffs were not affected by the contract of the deceased and that, in respect of the plaintiffs' rights, the jury should consider the duty owed the public generally, on the one hand, and the instruction that contributory negligence on the part of the deceased would bar the action. The state statutes only authorize suit for the wrongful act of the de-

fendant company. If the negligence of deceased *had* contributed and it was held no bar, the defendant company would be made liable for its own negligence *and that of another person also.* It would seem clear that the inability to determine how much of the damage would be attributable to the defendant company, if the deceased had contributed by negligence, would make the principle of contributory negligence as applicable here as elsewhere.

We further submit that, to put in operation this extraordinary jurisdiction, the obligation rests upon the petitioner to show affirmatively, even though the questions are of sufficient general importance to engage this court's attention by means of the writ, that the courts below are *probably* wrong. We submit that there should be raised a strong probability of error in order to overcome the presumption of competent decision by a court of high rank and dignity, which presumption is greatly enhanced by the extraordinary care of the trial court to insure a fair trial of the cause, shown by the thoughtful, painstaking and elaborate character of the instructions. (Trans., pp. 800-825.) We think this is in accord with the views of this court as expressed by Mr. Chief Justice FULLER, in Ex Parte Lau Ow Bew, 141 U. S., 583, as follows: "This branch of our jurisdiction should be exercised sparingly and with great caution," and "The inquiry upon this application, therefore, is "whether the matter is of sufficient importance in itself "*and sufficiently open to controversy* to make it the "duty of this court to issue the writ applied for." The

probability of error, we submit, has not been shown by the somewhat disconnected suggestions of the petitioner.

Since, however, the questions have been raised, and it being possible that this court may view them as of that great and national importance demanding their decision by the supreme national tribunal, we feel it necessary to remove the possibility of doubts which might arise in the court's mind, and to show to the court that the questions presented by the petitioner are not "suffi-"ciently open to controversy to make it the duty of this "court to issue the writ applied for." We are specially impelled to this full presentation because of several inaccuracies which have crept into the petitioner's showing, which make a close scrutiny of the record necessary, and because of the fact that the widowed plaintiff has borne the burden of three trials of this cause—two in the trial court—and we do not feel justified in permitting the risk of the burdens of a fourth trial and the consequent delay to fall upon her through want of light on the real merits of these questions at this time.

II.

The Relation of the Statutes of Idaho and Washington and the Contract between Deceased and Petitioner to the Rights of the Plaintiffs.

The contract on the back of the transportation alleged to have been used by the deceased at the time of his death (Trans., p. 784), which contract purports to release the petitioner from all liability for injury to the person

of the deceased, caused by the negligence of the petitioner, is void as against the plaintiffs.

(1) Because plaintiffs were not parties to such contract, and over *their* right of action for loss to *them*, deceased could exercise no control.

(2) Because the contract does not exempt the carrier from liability for death.

(1) THE STATE STATUTES.

The plaintiffs have an independent, separate and distinct right of action for the losses to them occasioned by petitioner's negligence, which right of action the deceased could neither enjoy nor in any wise control.

The negligence of the petitioner, and the death of the deceased therefrom, both occurred in the state of Idaho. The statute of Idaho authorizing this action to be brought is as follows:

"When the death of a person, not being a minor, is "caused by the wrongful act or neglect of another, his "heirs or personal representatives may maintain an ac- "tion for damages against the person causing the "death; or, if such person be employed by another per- "son who is responsible for his conduct, then, also, "against such other person. In every action under this "and the preceding section, such damages may be given "as, under all the circumstances of the case, may be "just." (Revised Statutes of Idaho, § 4100.)

The statute of Washington, in which state the action was brought, is as follows:

"The widow, or widow and her children, or child or "children, if no widow, of a man killed in a duel shall "have a right of action against the person killing him, "and against the seconds and all aiders and abettors. "When the death of a person is caused by the wrong- "ful act or neglect of another, his heirs or personal "representatives may maintain an action for damages "against the person causing the death, or when the "death of a person is caused by an injury received in "falling through any opening or defective place in any "sidewalk, street, alley, square or wharf, his heirs or "personal representatives may maintain an action for "damages against the person whose duty it was, at the "time of the injury, to have kept in repair such side- "walk or other place. In every such action the jury "may give such damages, pecuniary or exemplary, as, "under all the circumstances of the case, may to them "seem just." (2 Ballingers's Annotated Codes and Statutes of Washington, § 4828.)

These two statutes are for the exclusive benefit of the heirs, and are not for the benefit of the estate of the deceased. This answers petitioner's reasoning on page 12 of its brief, the statutes of California and Idaho being identical.

Munroe v. Dredging etc. Co., 84 Cal., 515.
Noble v. Seattle, 19 Wash., 133.

It will be noted that, with the exception of four words in the Idaho statute, to-wit: "not being a minor," the

language of the two statutes of Idaho and Washington is identical where authorizing an action for death caused by wrongful act or neglect.

There is one proposition in the interpretation of this character of legislation in support of which there is a vast weight of concurrent authority, and that proposition is that Lord Campbell's act, and the many acts inspired by it in the various states of this country, including the two states of Idaho and Washington, create and grant to other persons than the deceased or his estate, an independent right to recover for the losses sustained by such other persons through the negligence of a party causing death, such right of action being separate and distinct from any right of action which the deceased had, or could have enjoyed had he survived.

The English interpretation of Lord Campbell's act is unmistakably to this effect. In Blake v. Midland Ry. Co., 18 Q. B., 93; 10 Eng. L. & Eq., 443, Mr. Justice COLERIDGE says:

"The title of this act may be some guide to its mean-
"ing, and it is an act for compensating the families of
"persons killed, not for solacing their wounded feelings.
"Reliance was placed upon the first section which states
"in what cases the newly given action may be main-
"tained although death has ensued, the argument be-
"ing, that the party injured, if he had recovered, would
"have been entitled to a solatium and, therefore, so shall
"his representatives, on his death. But it will be evi-
"dent that this act does not transfer this right of action

"to his representative, but gives to the representative a "totally new right of action on different principles. "Section 2 enacts that 'In every such action the jury "'may give such damages as they may think propor- "'tionate to the injury resulting from such death, to the "'parties, respectively, for whom, and for whose benefit "'such action shall be brought. The measure of "'damage is not the loss or suffering of the deceased but "'the injury resulting from his death to his family.'"

In Reed v. Great Northern R. Co., L. R., 3 Q. B., 555, there seems to have been some language used, which has been pointed to by various courts since as showing a reversal of the interpretation in Blake v. Midland R. C., *supra*, but the same proposition was squarely held subsequently in Leggott v. Great Northern R. Co., L. R. 1 Q. B. Div., 599; and the same ruling occurs again in Robinson v. Canadian P. R. Co., decided by the house of Lords in 1892. An analysis of the English cases is found in Brown v. Chicago & Northwestern R. Co. (Wis.), 44 L. R. A., 579.

In our own country the construction put upon Lord Campbell's act in Blake v. Midland R. Co., *supra*, has been widely followed. In the case of Chesapeake & Ohio R. Co. v. Dixon, 179 U. S., 131, this court construed one of these acts, as follows:

"Section 6 of the Kentucky statutes provides: 'when "'the death of a person shall result from an injury in- "'flicted by negligence or wrongful act, then and in "'every such case, damages may be recovered for such

"'death from the person or persons, company or com-
"'panies, corporation or corporations, their agents or
"'servants, causing the same; and when the act is wilful
"'or the negligence is gross, punitive damages may
"'be recovered and the action to recover such damages
"'shall be prosecuted by the personal representative of
"'the deceased.'

"The cause of action thus created is independent of "any right of action deceased may have had, or would "have had if he had survived the injury."

In Gerling (Martin) v. Baltimore & O. R. Co., 151 U. S., 696, the court, considering the act of West Virginia, says:

"The right of action thus given although for the "same act or neglect for which the person injured "would have had a right of action in his lifetime, differs "from an action brought by him, both in the ground on "which it proceeds and in the award of damages. It is "not a common law action to recover damages for the "injuries suffered by him while he lived, but it is an "action given by statute for causing his death."

In Hulbert v. City of Topeka, 34 Fed. Rep., 510, Mr. Justice BREWER, then on the bench of the federal circuit court, discussing the statute of Kansas, in substance similar to Lord Campbell's act, says:

"Section 422 gives a new right of action, one not "existing before; an action which is not founded on "survivorship; an action which takes no account of the

"wrong done to the decedent, but one which gives to the "widow or next of kin damages which have been sus- "tained by reason of the wrongful taking away of the "life of the decedent. It makes no difference whether "the injured party was killed instantly or lived months; "whether he suffered lingering pain or not; whether "or not he was put to any expense for medical attend- "ance and nursing. None of these matters are to be "considered in an action under 422; and the single "question is, how much has the wrongful taking away "of his life injured his widow or next of kin? It is an "action to recover damages for the death, and in no "sense a survival of an action which accrued to the de- "cedent before his death; whereas, on the other hand, "section 420 provides for the survival of an action which "the decedent himself had in his lifetime."

In the Oregon, 73 Fed., 846, construing the Oregon statute, the court adopted this rule and says:

"It is substantially like Lord Campbell's act; and in "the case of Seward v. Vera Cruz, *supra*, the view held "was (Lord Blackburn concurring) not that the cause "of action survived, but that 'a totally new action is "'given against the person who would have been re- "'sponsible to the deceased if the deceased had lived; "'an action which, as is pointed out in Pym. v. Rd. Co., "'4 Best. & S., 396, is new in its species, new in its "'quality, new in its principle, in every way new, and "' which can only be brought if there is any person an- "'swering the description of the widow, parent or child,

"'who under such circumstances suffer pecuniary loss "'by the death.'"

In Munro v. Dredging etc. Co. 84 Cal., 515, the supreme court of that state, in discussing the statute of that state, which is written verbatim as the statute of Idaho, says, after quoting from Blake v. Midland R. Co., *supra*:

"We agree with what is said in the opinion above "quoted that the action given by the statute is a new "action, and not the transfer to the representative of "the right of action which the deceased person would "have had if he had survived the injury."

In Brown v. Chicago & Northwestern R. Co. (Wis.), 44 L. R. A., 579, in construing the statute of Wisconsin, similar in substance to Lord Campbell's act, and also the statute of that state of survival of the right of action had by the deceased, the supreme court of that state says:

"The death loss act of the English statute (9 and 10 "Vic. C., 93) commonly called 'Lord Campbell's act,' "and the various laws of a similar kind that have "been modeled after it, give a new cause of action, un- "known to the common law, for the benefit of certain "designated classes of surviving relatives. Such rela- "tives do not take the cause of action for damages to "the deceased by transfer to them by operation of law "or otherwise, but are enabled by statute to recover the "pecuniary loss to themselves caused by the wrongful

"taking off of the decedent, the continuation of whose "life would have been beneficial to them. * * * But, "independent of that circumstance, as before observed, "the language of the two provisions is plain; they re- "fer to entirely distinct losses, recoverable in different "rights; the one in th right of the deceased for the "loss occasioned to him; the other in the right of the "surviving relatives for the loss to them. * * * * * "The liability of the wrongdoer * * * is * * * on "a new right created by the statute—the right of sur- "viving relatives to compensation for the loss which "falls upon them."

As will be observed from the opinion of Mr. Justice BREWER in Hulbert v. City of Topeka, 34 Fed., 510, his views of the scope and effect of the statute of Kansas compensating loss by death, differed from the opinion of the supreme court of that state, expressed while Mr. Justice BREWER was a member of it, but the latest decision of the judiciary of that state, rendered by its court of appeals, refused to follow the supreme court, and is in accord with the views of Mr. Justice BREWER.

Mo. Pac. Ry. Co. v. Bennett's Estate., 47 Pac., 183.

In Perkins v. New York Central Rd. Co., 24 N. Y., 200, the court, in construing the New York statute based on Lord Campbell's act, says:

"This is a new and original cause of action given by "and dependent wholly upon the statute. The dam- "ages recoverable in such case depend upon entirely

"different principles from those recoverable by the per-
"son injured in case death had not ensued from the in-
"jury. In such case the person injured would only
"recover compensatory damages personal to himself,
"including expenses incurred and losses sustained in
"consequence of the injury. (Lincoln v. S. & S. Rd.
"Co., 23 Wend., 425.) But in a case where death re-
"sults from the injury the pecuniary value of the life
"of the person killed to the next of kin is the measure
"of damages, to the extent of five thousand dollars.
"(Whitford v. P. M. R. Co., 23 N. Y., 467; Blake v.
"Midland Ry. Co., 10 Eng. L. & Eq., 443.)"

To the same effect as the foregoing cases, are:

Adams v. N. P. Ry. Co., 95 Fed., 938.

Davis v. St. Louis I. M. & S. Ry. Co. (Ark.), 7 L. R. A., 283.

Jeffersonville R. Co. v. Swain, 26 Ind., 484-486.

Littlewood v. Mayor etc., 89 N. Y., 27.

Western & A. R. Co. v. Bass, 104 Ga., 392; 30 S. E., 874.

Vicksburg & M. R. Co. v. Phillips, 64 Miss., 693; 2 So. R., 537.

Hurst v. Detroit City R. Co., 84 Mich., 539; 48 N. W., 44.

Needham v. Grand Trunk Ry. Co., 38 Vt., 294.

Bowes v. Boston, 155 Mass., 344; 15 L. R. A., 365.

Commonwealth v. Met. Rd. Co., 107 Mass., 236.

Donahue v. Drexler, 82 Ky., 157; 56 Am. Rep., 886.

Fink v. Garman, 40 Pa. St., 95.
The Onoko (C. C. A.), 107 Fed., 984.
Roche v. Imperial Mining Co., 7 Fed., 703.
Re Mayo (S. C.), 54 L. R. A., 665.

It is manifest from the foregoing that the deceased during his life had no interest or right in the right of action granted exclusively to his heirs, which enabled him to release the petitioner from its liability for the loss to the plaintiffs, caused by petitioner's negligence.

There are many cases, however, both English and American, which hold that, unless the deceased had in him unimpaired a right of action for *his* injuries, at the time of his death, his heirs could not enforce *their* right of action under Lord Campbell's act, and the acts of various states in this country having certain peculiarities in them found in Lord Campbell's act. In some of these cases it has been held that a release by the deceased during life of *his* right of action barred the heirs of *their* right of action.

It is patent that, having an independent right of action for their loss under the statutes of Idaho and Washington, there must be found within the statutes creating such independent right of action an affirmative, positive, restriction upon, or qualification of, its full enjoyment by the plaintiffs in order to bar them from its prosecution. In Louisville etc. R. Co. v. Clarke, 152 U. S., 240, this court, construing a statute giving right of action for death, said:

"The statute imposes no other condition upon the

"right to sue. The court has no authority to impose "an additional or different one."

Herein lies the difference between the statutes of Idaho and Washington on the one hand, and Lord Campbell's act and most of the statutes of the states of the Union relative to death by wrongful act, on the other. In the two former there is no language out of which any condition to or qualification of the right of action in the heirs or widow and children can be construed. In nearly all the latter, and in those under which the courts have held the heirs barred of their right of action because of a release given or judgment gotten by the party injured during his life, is found the same peculiar language found in Lord Campbell's act, which is held to make the prosecution of the independent right of action given the heirs, conditional upon the existence in the deceased of his right of action unimpaired at the time of his death. This peculiar language is entirely absent from the statutes of Idaho and Washington. It is as follows:

"The act, neglect or default is such as would, if death "had not ensued, have entitled the party injured to "maintain an action and recover damages in respect "thereof, then and in every such case, the person who "would have been liable, if death had not ensued, shall "be liable to an action for damages, notwithstanding "the death of the person injured."

Out of this language, or similar language, the courts have held that the act or acts being construed contained

a *condition* to the prosecution by the heirs of the independent and distinct right of action for their loss, and that only when the condition existed could they prosecute their right of action. Thus in Brown v. Chicago & Northwestern R. Co. (Wis.), 44 L. R. A., 589, the court quotes the last expression of the English courts upon the construction of Lord Campbell's act, and adopts the view expressed as its own, as follows:

"As I have before said, I am of opinion that the "action being of the same nature, and indeed the same "action in all respects, as that conferred by Lord Camp- "bell's act it must, as an action on that statute is con- "sidered in England, be deemed to be a new action, but "still a new action dependent on the condition that the "action of the deceased had not, at the time of his "death, been barred or extinguished."

Again, in Littlewood v. Mayor etc. of New York, 89 N. Y., 24, which is a leading case in support of the proposition that the party injured may, by releasing the wrongdoer from liability for injury to his person bar his heirs of *their* right of action for the injury to them by his death, the court admits that the heirs have an independent and separate right of action for the losses occasioned to them by the death, and an entirely different right of action from any had by the deceased in his life time, and not a survival of any right had by him. But, while admitting this, the court holds, *because of the peculiarity of the language* heretofore quoted from Lord Campbell's act and found in the New York act, that it

is clear that the legislature intended that only in the event that the party injured had his right of action intact at the time of his death, could his heirs prosecute their right of action.

In another leading case, Hecht v. O. & M. Ry. Co. (Ind.), 32 N. E., 302, barring the right to recover for the death, by reason of recovery on his right of action during life by the deceased, the court, construing an act containing substantially the language above quoted from Lord Campbell's act, says:

"For *the act*, as we construe it, *clearly declares* that "the personal representatives of the injured party, "when death ensues, may maintain the action only in "case the injured party might, at the instant of his "death have maintained the action if he had lived. In "this case the injured party at the time of his death "could not have maintained an action for the same act "or omission had he lived; hence there is no right of "action given to his personal representatives by the "statute."

And in Sherlock v. Alling, 44 Ind., 197, the court says:

"The right of action, which the deceased had at his "death, is not by the law transferred to his representa- "tives, but it gives to them a totally new one on different "principles * * yet *by the terms of the act*, no action "can be maintained under it, unless the act or omission "causing the death was such that the deceased might,

"if alive, maintain an action for an injury caused by "the same act or omission."

The statute of South Carolina is verbatim Lord Campbell's act (Tiffany, Death by Wrongful Act, p. 329), and Price v. Richmond & D. R. Co., 33 S. C., 556, 12 S. E., 413, is one of the leading cases holding that a release of the railroad from liability for his injuries by the deceased during life bars the widow and children of *their* right of action for the death. The court says:

"But the construction which we have adopted seems "to us to be the only legitimate one which can be de- "duced from the *terms of the statute*, and it has the sup- "port of high authority."

Re Mayo (S. C.), 54 L. R. A., 665.

In the case of Hill v. Pennsylvania R. Co., 178 Pa., 223, 35 L. R. A., 196, a release given the railroad company by the deceased during life, was held to bar suit by the widow for his death. Here again we find potent language in the statute, on which the decision rests, and which is entirely wanting in the Idaho and Washington statutes, and there are other pronounced differences. An action after death is permitted "Whenever death "shall be occasioned by unlawful violence or negligence, "*and no suit for damages be brought by the party in-* "*jured during his or her life*" etc. From this language and other features of the statute peculiar to it, the court construes it to merely keep alive to certain specified persons the very right had during life by the deceased

to recover for *his* injuries; that the widow could not recover under it in her own right for her own injuries; and that the deceased, having full power in life to prosecute this *his* own right of action, had also as "a neces- "sary incident to the right of ownership of the right of "action," the right to settle it by release. None of the peculiarities of this statute on which the decision rests are to be found in those of Idaho and Washington.

In the case of Lubrano v. Atlantic Mills, 19 R. I. ....., 34 L. R. A., 797, the court seems to hold that, under the act of Rhode Island containing language similar to that of Lord Campbell's act, where there is also an act surviving the right of action for the injuries suffered by the deceased, there is not given a separate and independent right of action to the widow and children of the deceased for the losses suffered by *them*, but that there is only a sort of a continuance or survival of the right of action which the deceased had, and that after his death, notwithstanding the distinct survival statute, an action would not lie on behalf of the estate of the deceased and also on behalf of the widow and children.

This is in conflict with the great weight of authority heretofore cited, but if it were not, the reasoning pursued by the court does not invite reliance upon its conclusion. It says:

"Upon this principle the new remedy must be ex- "clusive *since otherwise there would be two recoveries for* "*the same cause of action* namely, the negligence of the "defendant, which is the cause of action on which the

"deceased would have sued at common law, if he had "survived."

In this case the court seems to esteem it a hardship on the wrongdoer, from which the legislature *must* have sought to save him, that the wrongdoer should have to pay damages twice for the same wrongful act, once to the party injured by being hurt physically, and again to another party injured by being deprived of support, maintenance, etc. This reasoning appears in several cases where the scope of the statute is restricted. In this view the damages are treated as a penalty or punishment and it is regarded in these cases as a harsh and unjust measure to punish twice for the same offense. If the sympathetic eye in these cases were not focused exclusively on the corporation, but were permitted to view the person injured and the widow and children, it would be readily seen that the damages recovered are not, except incidentally, in the way of punishment of the corporation, but in the way of compensation for their losses.

We are not able to perceive why the corporation should not be liable to two parties, each injured by a single act of negligence, in these case, with as much propriety as when, by a collision from negligence, thirty, forty or one hundred different people are injured by the same negligent act. In the latter case a court would hardly suggest that only one of these many injured persons could recover on account of the negligent act which had injured the many, or that a release by such one

would preclude the other injured individuals from recovering for their loss through such negligent act. In the case at bar the widow and child are separate and distinct individuals, having separate and distinct capacities from that of the deceased to suffer loss, and through the act of negligence which also injured the deceased, these plaintiffs have been made to suffer pecuniary loss. There is certainly nothing harsh or inequitable in the statute giving to people, wrongfully deprived of support, education, etc., their own right to recover for themselves the peculiarly personal loss thus sustained exclusively by them. Certainly the proposition is not so inequitable as to induce the court to impose an arbitrary condition to the enjoyment of this right, to support which condition there is no word in the statute.

Hedrick v. Ilwaco R. & N. Co., 4 Wash., 400.
Brown v. Chi. & Northwestern R. Co. (Wis.), 44 L. R. A., 579, 585.
Louisville etc. R. Co. v. Clarke, 152 U. S., 240.

The court in Lubrano v. Atlantic Mills, *supra*, says as a further reason for its conclusion:

"A further consideration in favor of a single action "is the confusion of damages which would result from "the maintenance of two actions. Although they might "be theoretically separate, a practical separation would "be quite impossible. The measure of pain and suffering, or estimated damage to one's estate cannot be so "definitely marked as to limit liberality of a sympathetic jury."

It does not seem to us that because a jury may be sympathetic, such fact should weigh in the legislative mind against giving a party injured by the wrongful act of another the right of action for such injury, nor should the sympathy of a jury for one man's pain and suffering preclude the legislature from giving the right of action to a woman and her children for actual financial losses sustained by them from the same wrongful act that caused such pain and suffering to another. We cannot agree with the learned court that it is impossible to prove separately and distinctly the damages sustained by the deceased from injuries to him, and the damages sustained by the widow and child from the distinct losses occasioned to them by the same negligent act, and the New York supreme court agrees with us.

Littlewood v. The Mayor etc. of New York, 89 N. Y., 28.

Finally, in this analysis of authorities, we call attention to the case of Donahue v. Drexler, 82 Ky., 157; 56 Am. Reps., 886, in which the effect of a release by the deceased during life, under a statute, for the purposes of the question now discussed, identical with those of Idaho and Washington, has been considered.

One Kentucky statute is as follows:

"Section 1. If the life of any person not in the em-
"ployment of a railroad company shall be lost in this
"commonwealth by reason of the negligence or careless-
"ness of the proprietor or proprietors of any railroad,

"or by the unfitness, or negligence or carelessness of "their servants or agents, the personal representatives "of the person whose life is so lost can institute suit "and recover damages in the same manner that the "person himself might have done for any injury where "death did not ensue." (Tiffany, Death by Wrongful Act, p. 300.)

From its latter part this section has been construed, in Louisville & N. R. Co. v. McElwain, 98 Ky., 700, 34 L. R. A., 788, as a survival statute, keeping alive a right of action within the control of the person injured during life. Kentucky has a further statute, as follows:

"Section 6. The widow and minor child or children, "or either or any of them, of a person killed by care- "less, wanton or malicious use of firearms or by any "weapon popularly known as colts, brass knucks or "slung shots, or other deadly weapons, not in self- "defense, may have an action against the person or per- "sons who committed the killing, and all others aiding "or promoting the killing, or any one or more of them, "for reparation of the injury, and in such action the "jury may give vindictive damages." (Tiffany, Death by Wrongful Act, p. 300.)

It will be noted that in the section of the Kentucky statute last quoted no condition is imposed upon the right of the widow or children to bring their action; the right is given absolutely, without restriction directly or by implication, and irrespective of any rights whatever,

or the exercise of them, which the person assaulted may have had in the premises. It is identical in these respects with the statutes of Washington and Idaho giving the right to recover for death.

In Donahue v. Drexler, *supra*, the party assaulted brought an action to recover for personal injury, and the action was thereafter, by written agreement, settled between the plaintiff and defendant. Subsequently the party assaulted died from his injuries, and, under the above statute, the widow brought *her* action for the injuries done to *her* by the death.

In holding that she could bring her action entirely uninfluenced by the settlement by the party injured of *his* right of action, the court said:

"In this case we find two causes of action with dif-
"ferent purposes and reasons for their existence. The
"suit for assault and battery could not have survived to
"the personal representative, for the statute says it shall
"die with the person injured or injuring. It was a per-
"sonal action purely for bodily injury; not for pain,
"suffering and loss of service to his wife and children,
"after the injury and before death, and the compensa-
"tion which he had the right to was extinguished by
"his death, or the settlement which he made. But his
"right of action for the bodily injury from the assault
"and battery, is wholly distinct from the action which
"the widow and minor children may have for reparation,
"after injury resulting to them from the death. This
"statute creates a new grievance, a new cause of action

"in which neither the deceased nor his estate had any "interest, and for which his administrator could not sue. "It is based upon the wrong to the wife and children by "depriving them of their natural support and protection "which the law gives them in the husband and father.

"The injury is to them and their rights. They have "the exclusive right of action under the statute, and are "entitled personally to the results of any judgment "that may be recovered."

The case of Bowes v. Boston, 155 Mass., 344, 15 L. R. A., 365, also construes a statute, for the purposes of this question, identical with that of Idaho and Washington, and, if it be borne in mind that it contains no restriction or condition upon the right given, the conclusion of this case is the same as that of Donahue v. Drexler, *supra.*

Doyle v. Fitchburg, 162 Mass., 66; 25 L. R. A., 157.

We note the case of Southern Bell Tel. & Tel. Co. v. Cassin, 111 Ga., 577; 50 L. R. A., 694. This case is without weight as authority in this court.

It is in square conflict with the ruling of this court (Chesapeake & Ohio R. Co. v. Dixon, *supra)* in holding that the widow, children or heirs do not have an independent, separate and distinct right of action for the losses to them caused by the death from negligence. On this point also the decision is equally in conflict with a prior decision of the same court, namely, in Western & A. R. Co. v. Bass, 104 Georgia, 392. In

the Cassin case the court holds the Georgia statute to be a survival statute, and rests its conclusion that a release by the deceased bars the widow and heirs, on the authority of the many cases, heretofore considered by us, which hold such a release to constitute such a bar; but in all of those cases is to be found the peculiar language in Lord Campbell's act creating, not the survival of the right of action had by the deceased, but a *condition*, only upon which the widow and heirs might prosecute their own independent right of action for their loss. This language is not found in the Georgia statute and, hence, those cases are not authority for the holding of the Georgia court that a release, as a general rule of law, bars the widow and heirs. This is true of the case of Legg v. Britton, 64 Vt., 652, which the Georgia court says construes "a statute admittedly like our own." The statute of Vermont is not like that of Georgia, because it contains the peculiar language of Lord Campbell's act creating a condition upon which must be exercised the right of action given to the widow and heirs, and it is on that language that the Vermont court bases its conclusion, for it says: "*The language used* clearly gives the same "right of recovery which would have existed in the "intestate if death had not ensued, and as clearly holds "the wrongdoer liable the same as he would have been "if death had not ensued."

The Georgia statute has peculiar language of its own, not found in the Idaho and Washington statutes, which tends to turn the Georgia statute from a death statute

into a survival statute. "In the event of a recovery by "the widow, she shall hold the amount recovered sub- "ject to the law of descents just as if it had been per- "sonal property descending to the widow and children "from the deceased." The Georgia statute does not permit the recovery by the widow or children of *their* actual losses, but provides for the recovery of the "full value of the life."

Further, it is submitted that the reasoning of this case is an argument *ab inconvenienti*, and where that is not resorted to, rests on the Biblical theory of the unity of man and wife, and entirely overlooks the modern legal emancipation of the woman. Finally, the actual language of the statute itself is nowhere discussed in the opinion.

The case of L. & N. Co. v. McIlwain, 98 Ky., 700, is cited in the Cassin case as upholding the conclusion reached there, but it aids not at all in construing the statute of Idaho or of Washington. The statute of Kentucky there construed is a survival statute. The personal representative "may institute suit and recover "damages in the same manner that the person himself "might have done for any injury where death did not "ensue"; the proceeds, under the statute, go to the estate.

(2) INTERPRETATION OF CONTRACT.

The contract offered in evidence and pleaded (Trans., p. 784), purports to exempt the petitioner from liability for "injury to the person," but it is urged that it

exempts the corporation from liability for *death* also and that it should be read thus:

"The person accepting this free ticket agrees that the "Northern Pacific Railway Company shall not be "liable under any circumstances, whether of negligence "by agents or otherwise, for * * * killing * * * "the passenger using the same."

This written contract does not expressly release the carrier from liability for *death* of the passenger. The word death is not used in it, nor is any word which means death, nor is any word used signifying a condition from which death necessarily follows, or usually follows, or even so frequently follows as that there is any natural or rational implication of death from it. On the contrary, the expression "injury to the person," in its ordinary use, conveys the idea of a condition coexistent with life. In the ordinary use of the expression it implies life instead of death. If one were killed by violence, common usage would not describe the passenger's condition as that of "injury to the person," but as that of *death*, or that he was killed. If not *immediately* killed, common usage would say he had received "injury to his person," but would not stop there, for that would not express the actual condition, but would further say *and* from such injury he died. The condition of death would thus be entirely additional to "injury to the person" within the common acceptance of the meaning of these terms. Any one *intending* by the ordinary use of language to release another from

liability for killing him would, therefore, not stop short of expressing the exact condition intended. Certainly, if in any situation in life exact expression is called for, it is where one man is authorizing another in effect to take his life with impunity.

But the law has clearly defined the scope and meaning of these expressions, "injury to the person" and "death." In the law there is the same radical difference that exists in the natural meaning of the two expressions.

In the many cases where statutes have been passed providing for the survival of rights of action for "injury to the person," no court or legislature has ever held that this expression included and meant "death" *also*, but, on the contrary, to permit an action for death, invariably, notwithstanding a right of action already existed for "injury to the person," an additional act had to be passed providing a right of action for death as for an additional, distinct and different injury; and a right of action for "death" has been steadily held not to include a right of action for "injury to the person." Out of this independence of meaning in the two expressions grow the two statutes which obtain in many states, viz., "survival statutes" and "death statutes." All of the cases under the preceding heading are authority as to the legal meaning of these two expressions, to which we call attention. Out of them the following will very well illustrate the proposition.

Hulbert v. City of Topeka, 34 Fed., 510.

Missouri P. Ry. Co. v. Bennett's Est., 47 Pac. Rep., 183.

The question now discussed is that of the interpretation of a written contract purely; nothing more. And the ordinary rule applies that the intention is to be gotten from the language used. The meaning given the language by common usage, by natural interpretation and by legal interpretation, excludes a release of liability for death. Now where is the equity or extraneous circumstance which will warrant the court in doing violence to the language and in interpolating into the contract an additional term? When the corporation wrongfully injures a person and he thereafter dies therefrom and the law causes a right of action to survive for "injury to his person," the courts allow no extraneous circumstances to weigh in favor of those who own this right of action, even though it be the widow and children, and they be destitute, and even though the death be caused by wanton and reckless disregard of ordinary care. The expression in the law, "injury to the person," is kept within its normal meaning so as to exclude a recovery for the death. As contrasted with the widow's unavailing equity, we have the corporation pleading for the right to be free from liability for wrongfully killing a human being and for wrongfully causing the destitution of the widow. The corporation could not even say that it would be out under the contract if it were not released from liability for "death" in addition to "injury to the person," because, if the contract has any validity, the corporation received in return for transporting the deceased from Hope, Idaho, to Spokane, Washington, immunity from liability for "injury to

the person," and the deceased, in consideration of his transportation, relinquished his own right to sue if he survived, and under a survival statute, relinquished the right of his estate to sue for injury to his person if he died. A good consideration is some detriment to the promissee or some benefit to the promissor. This, as a consideration for the contract of carriage, was both, We are content to think that no violence will be done to the language of this contract in an effort to extend the immunity of a common carrier to negligent killing of passengers carried.

Clark v. Geer (C. C. A.), 86 Fed., 448.

In construing the contract, if there be some obscurity in its terms, the moral quality of the two constructions contended for is properly to be considered. If the petitioner was merely contending for the right under the contract to destroy goods with entire impunity, this rule, purely as one of interpretation, might not be applicable. There is nothing immoral *per se*, or *contra bonos mores*, in the destruction of goods by a common carrier. But in all time since the Almighty laid the law upon the world "Thou shalt not kill," the taking of human life has been a thing evil and pernicious in itself. Though the killing be done by negligence, it does not relieve the act of its essentially evil quality, and nations have recognized this by making negligent killing indictable and punishable. Hence the rule is clearly applicable here, that where there are two interpretations of a contract possible, one of which leads to essentially evil results,

and the other is more consonant with reason and justice, the latter will be adopted.

Coghlan v. Stetson, 19 Fed., 727.
Woodward v. Payne, 16 Cal., 445.

CONTRACT AS EVIDENCE OF DEGREE OF CARE DUE.

But if the contract could be held to extend to death, nevertheless the ticket and contract as evidence to show the status of the deceased or the degree of care to which he was entitled, that he "assumed the risks," were clearly irrelevant and immaterial.

If the ticket showed that he was carried free, nevertheless the deceased was a passenger and entitled to the same degree of care as other passengers and as if he had paid his fare.

Phila. & R. R. R. Co. v. Derby, 14 How., 485.
Steamship New World v. King, 16 How., 469.
Waterbury v. N. Y. C. & H. R. R. Co., 17 Fed., 67.

This is the duty of a common carrier to one voluntarily carried, and the contract on the back of the pass does not purport to change this duty, but recognizes it and provides that if the carrier violates *this* duty and the deceased suffers injury through such violation of this duty, the damages to which the deceased would be entitled through the failure of the carrier to give him the rightful degree of care need not be paid—"The com-"pany shall not be liable under any circumstances "whether of negligence" etc., that is, neglecting its duty.

There is no word in the contract that declares the carrier owes no duty, or that a failure to perform its usual duty or to give the usual care will not be *negligence*. On the contrary, the contract itself expressly fixes the status of the party using the ticket as that of a "passenger," and expressly states that, when the carrier has become guilty of "negligence," then it shall not be liable for the injury from such "negligence." The contract contemplates the failure of the carrier to perform a *duty* after it has gone into effect, and contemplates the carrier becoming guilty of *negligence* after it has gone into effect, and notwithstanding the making of the contract. If the "injury" to the "passenger" from such "negligence" were not wrongful it was not necessary for the contract to state that the carrier should not be liable for it. A release from liability for injury resulting from negligence, given *after* the occurrence, would not make the act otherwise than negligent, nor the injury otherwise than a wrong. A release from liability for the wrong *when it shall happen*, clearly has no different effect. It is the consequences of a wrongful act that are being guarded against. Petitioner admits (petitioner's brief, p. 13) that *some* care is owing notwithstanding the contract; it says it is only the *highest* degree of care which the contract provides the carrier need not give (petitioner's brief, p. 13), but petitioner fails utterly to show us how this apportionment of care is to be made. If releasing from liability for the injury consequent on negligence relieves from the duty to take the *high* degree of care, it relieves equally from the duty to take any care whatever; there

is no restriction or stopping place indicated in the contract. If the liability for the consequences of its "negligence" be the factor in the contract by which the degree or amount of care owing is to be determined, then *no* liability would logically indicate *no* care whatever; *some* liability *some* care. If there was *no* care due there could not be the "negligence," which is so clearly recognized and anticipated in the contract.

The petitioner is groping heavily in the dark. Its brief asserts that deceased was not a *passenger* as the reason why he was not entitled to the *highest* degree of care (petitioner's brief, p. 13), and yet the contract itself says he *was* a passenger, and the negligence which the contract anticipated the petitioner may become guilty of, is clearly, on the face of the contract, negligence in relation to deceased *as such passenger*.

This contract, further, does not state that the deceased "assumed the risks of traveling," or any of them, and the law of fellow servant is clearly inadmissible here. This contract is in marked contrast with the Voigt contract, where an assumption of the risks is expressly provided for. (176 U. S., 498.) It is further in contrast with the contract in the Voigt case in this, that it *is* provided in the latter that it shall cover death.

III.

"Assumption of the Risk," or Contributory Negligence.

On page 20 of its brief, petitioner seems to contend that outside of and in addition to the doctrine of contribu-

tory negligence, and outside of the law of master and servant, there is a principle of law to the effect that a person having knowledge of the unvestibuled condition of the platforms and crossing them with that knowledge, cannot recover for the negligence of the defendant in leaving the platforms uninclosed—or open at the sides; that passing over the defective way with knowledge of the defect, as a matter of law, is a plain case of "risk assumed by the deceased," and a bar to a suit for the negligence occasioning the defect and consequent injury. It is sufficient to say that the law knows no such doctrine. Whether the injured party's conduct, with knowledge of the defect, is a bar, must be determined by the law of contributory negligence and not otherwise. Mere knowledge of the defect when passing over the platforms is not, as a matter of law, a bar as being an "assumption of the risk."

Crane Elevator Co. v Lippert (C. C. A.), 63 Fed., 942.

Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.

Kelly v. Blackstone, 147 Mass., 448.

Lawless v. Conn. River R. Co., 136 Mass., 1.

Looney v. McLean, 129 Mass., 33.

Harris v. Township, 64 Mich., 447; 8 Am. St. Reps., 842.

Nolan v. Brooklyn City & N. R. R. Co., 87 N. Y., 62.

The Evansville & T. H. R'd Co. v. Crist., 116 Ind., 451.

Crossing the open platforms was not *per se* contributory negligence even though deceased knew them to be open.

McAfee v. Huidekoper (D. C. App.), 34 L. R. A., 720.

Ches. & O. R. Co. v. Clowes, 93 Va., 189; s. c., 24 S. E., 833.

Graham v. McNeil, 20 Wash., 466.

Werle v. Long Island R. R. Co., 98 N. Y., 650.

Vaslee v. Grant & C. Ry. Co., 16 Wash., 602.

Warner v. B. & O. R. Co., 168 U. S., 339.

Graven v. McLeod, 92 Fed., 846.

In the absence of an eye witness the law presumes that, at the time of the accident, the deceased was in the exercise of due care, and the burden of proof to the contrary, by a preponderance of the evidence, was on defendant.

Tex. & Pac. R. Co. v. Gentry, 163 U. S., 353.

Cameron v. Great Northern Ry. Co., 77 N. W., 1020.

Ind. & C. R. Co. v. Horst, 93 U. S., 291.

Phillips v. Mil. & N. R. Co., 77 Wis., 349; 46 N. W., 543.

The question was clearly one of contributory negligence and for the jury.

Richmond & Dan. R. Co. v. Powers, 149 U. S., 45.

Grand Trunk R. Co. v. Ives, 144 U. S., 408.

The jury was properly instructed that contributory negligence by deceased would bar the action. (Par's 30, 44, 45, 46, 47, Trans., pp. 812, 819-821.) No exception was taken to these instructions to the jury to consider the conduct of deceased in relation to contributory negligence, instead of in relation to "assumption of the risk," and no instruction was requested on the latter. (Trans., pp. 825-830.)

In view of the insistence by petitioner upon the "assumption of the risks" proposition, we state the facts showing the conduct of deceased.

The deceased left the smoking car to go to the diner shortly after the train left Hope, and while the train was going at a moderate rate of speed. (Trans., pp. 90, 91, 94, 104, 105, 116.) The *usual* rate was moderate rom Hope to Sand Point. (Train Schedule, exhibit A6.) He did not leave the smoker until after the conductor had taken up his fare. (Trans., pp. 387-391.) The train went at moderate speed until it reached about the east end of the Pack River trestle (Trans., pp. 90, 91, 94, 104, 105, 116), which point was about four miles from Hope. In order for the deceased to have gotten from the smoker into the diner, and to have transacted his business there, and to have started back by the time the train reached the point where his body was found, it was necessary for him to leave the smoker shortly after leaving Hope, and before the train reached the east end of the trestle. He was a short, heavy man, and necessarily moved slowly. (Trans., p. 216.) He had to go from the front end of the smoker back to its rear end, open

and close the door of the smoker, cross the platform of the smoker and the platform of the adjoining day coach, open and close the door of the day coach, passing within, pass down the length of the day coach, open the door of the day coach, pass out, close it, cross the platform of the day coach, cross the platform of the tourist sleeping car, open the door of the tourist sleeping car, pass in, close the door, pass down the length of the tourist sleeping car, open the rear door of the tourist sleeping car, pass out, close it, cross the platform of the tourist sleeping car, cross the platform of the dining car, open the door of the dining car, pass within, close the door and pass to the center of the dining car, where he took a seat; during all of which the train was rolling on. He then had a conversation with the waiter in the dining car, telling him that he desired cigars. (Trans., pp. 475-490.) The conductor of the dining car was absent, and the waiter went back half the length of the dining car, opened the rear door, passed out, closed it, crossed the rear platform of the dining car, crossed the front platform of the Pullman sleeper, opened the door, passed within, closed the door, and passed down a part of the length of the sleeping car until he found the conductor of the dining car. The waiter then told the conductor of the dining car that there was a gentleman in the dining car who wished cigars; the conductor of the dining car then returned with the waiter, going part the length of the Pullman sleeping car, the door of which the waiter opened, and the conductor passed through, crossed the two adjoining platforms, opened the door of

the dining car, passed within, and passed half its length forward to where the deceased was sitting, who rose to meet him. A conversation then took place in which the deceased stated that he wanted cigars and indicated the kind he wanted; the dining car conductor then went back to the locker in which the cigars were kept, the door of which was locked, took from his pocket a bunch of keys and selected therefrom the appropriate key, unlocked the door, found within, from the various boxes of cigars, the box containing the kind of cigars which the deceased desired, and returned with them to the deceased, who thereupon gave the conductor a quarter in payment. Thereupon the deceased turned and walked slowly forward half the length of the dining car, opened its front door, passed out and closed it. (Trans., pp. 475-490.)

During all of this progress through the train, and the waiting for the conductor in the dining car, and the transaction of the business there, the train was rolling on, and, at the time the deceased turned from the conductor of the dining car to go forward, the train was off the west end of the Pack River trestle. (Trans., p. 482.) It is manifest that for a heavy man, over 200 pounds, to make such a journey through the train, wait in the diner as he waited, and be through with his business in the dining car just after the train left the west end of the Pack River trestle, he must have left the smoking car shortly after the train left Hope, and a considerable time before high speed was developed, and he had no warning which could have induced him to keep his seat in the smoker. The high

speed began about the west end of the Pack River trestle (Trans., pp. 105, 117, 118); the train was going fifty miles an hour just west of the trestle (Trans., pp. 117, 118, 105, 106), and from that up to sixty miles an hour at the point where the body was found. (Trans., pp. 104-106, 117-118, 128-134, 94, 95.) From the west end of the Pack River trestle to the point where the body was found was one mile and 3,480 feet, or forty feet less than one mile and two thirds. (Trans., pp. 191, 192, 142, 145, 149, 150, 187, 188, 175-180.) The train, therefore, ran, after the high speed developed, a mile and two-thirds with the deceased on it, and ran that mile and two-thirds at from fifty to sixty miles an hour, according to the testimony. If we make a conservative average of the testimony, and say fifty miles an hour, we have nearly two minutes consumed in running from the west end of Pack River trestle to the point where the deceased was thrown from the train, and, therefore, the very high speed was in operation not quite two minutes before deceased was thrown off. During a part of this two minutes the deceased had his mind occupied in the purchase of the cigars from the dining car conductor, and it was, during all the time, fixed on returning to the smoking car where his overcoat was left and his friend awaited him. The sharp curves, such as would produce lurching and might call an ordinary traveler's attention to excessive speed, were some little distance west of the west end of the Pack River trestle. Immediately east of the curve at which the deceased was thrown from the train is a tangent, a perfectly straight piece of track,

990 feet in length, on which the train would run steadily without lurching or lateral motion. (Trans., p. 190.) Now, under these circumstances, it is seriously urged that this court will usurp the functions of the jury and will conclusively presume that within this flash of time, the deceased did fully realize and know that the defendant had raised its speed to a dangerous pitch, and would maintain it at such point, so that it would be perilous for the deceased to return to the smoking car. To so assume that he would have known within this brief space that the speed was such as would put him in peril in crossing the platforms, charges the deceased with an instantaneous perception of changes in the condition of speed *and the reaching of the danger point*, which is not had by mankind at large. This is a matter also which one not connected with the train would be slow to give his attention to, it not being his duty to notice and observe such matters, nor is he charged primarily with his own safety in regard to them. He had the right to be slow to realize that the train would be run at such speed as to put passengers, while rightfully conducting themselves upon it, in peril. The dining car conductor, a railroad man of long experience, evidently did not realize, at the time deceased left the dining car, that the running of the train had been so changed in that scant period as to make the ordinary uses of it attended with peril, for he watched the deceased slowly leave the car, which the open platform adjoined, without a word of warning. (Trans., pp. 481-483.) If however, the dining car conductor from his great familiarity with trains, and

with the duty on him of protecting passengers, had so quickly realized the change in the running of the train from a normal condition to one of danger to passengers, and if the deceased, notwithstanding the natural presumption and rightful reliance on the fact that the train men were doing their duty, might have been as quick as the expert to note such change and its import, the action of his mind to this effect and to the realization of danger, would have been clogged and stopped by the silence of the experienced and responsible dining car conductor, which silence proclaimed to him that what he was then doing, under that conductor's eye, might be safely done.

Even though the deceased can be held charged, at his peril, to know the rate of speed maintained each minute by the carrier, whose duty is to maintain a safe speed every minute, and must be further held to be able to apportion properly the increase of danger to each additional mile in the rate of running, yet, nevertheless, with a space of only two and a half or three feet to cross, with the invitation of the carrier to cross it, with the conductor looking on without warning or objection, and with the air brake to moderate the lurching at the curves, the failure to use which the deceased could not anticipate, with the exercise of care by the deceased in crossing (he was exercising care when last seen, Trans., pp. 482, 484), having been induced to go to the dining car by the rightful presumption that he might return to the smoker safely, his overcoat and companion being in the smoker, and the dining car being neither a smoking car or a sitting car—the doing of the act does not import

such peril as to make it, under these circumstances, an unreasonable act for an ordinarily prudent man to do, and it is certainly not, as a matter of law, negligence.

Mere knowledge of the greater speed maintained, if the deceased had it, does not make the question one for the court. It is still a question for the jury whether, *in view of all the attending circumstances*, going back to the smoker was negligence (Authorities, *supra*, pp. 49-50).

If it be assumed that the increased volume of sound, as the deceased took the step across the narrow platform, necessarily told him that the platform was not vestibuled, it would not necessarily have told him that the carrier had defaulted in his whole duty and had not put a chain, or rail, or iron gate at the sides of the platform.

In taking the step across the platform, on a moving train, a careful man necessarily fixes his eye directly in front of him on the rail or object which he intends to grasp to steady himself, and does not look to the sides of the platform. This is common experience, and the deceased may well have crossed the open platform without acquiring the knowledge that it was not guarded by rail, chain or gate, as it should have been, and he therefore cannot be held charged with the knowledge that the platforms were *entirely* unguarded. In this connection also the facts are pertinent that deceased's eyesight was not good (Trans., p 213), and it was a cloudy day and growing dark. (Trans., pp. 100, 101, 108, 114, 260, 261.)

All of the many circumstances bearing on whether the deceased was guilty of negligence or not, have been

passed upon by the jury; the judge who heard the evidence and saw the witnesses refused a new trial. There was no error in this question going to the jury.

Sioux City & Pac. R. R. Co. v. Stout, 17 Wall., 657.

IV.

The Cause of Death.

Petitioner's complaint that there was not sufficient evidence to enable the jury to determine how the deceased came to his death, seems hypercritical in the extreme.

The rule in one of the cases forced on the attention of the court below on behalf of the petitioner in this connection, was thus stated:

"The circumstances themselves must be shown, and "not left to rest in conjecture; and, when shown, it must "appear that the inference sought is the only one which "can fairly and reasonably be drawn from these facts."

Ruppert v. Brooklyn Heights R. Co. (N. Y.), 47 N. E., 971.

It is of very little moment, in determining the sufficiency of evidence in a given case, that other evidence in other cases was held insufficient. It is with the facts shown in the case at bar that we are concerned.

There being no eye witness to the death, circumstantial evidence is necessary to prove the manner of it. We state the facts actually shown and not left to

conjecture, from which there is but one fair and reasonable inference to be drawn, viz., that deceased was killed by being thrown from the open platform by the lurching of the train and by falling upon the rocks below.

The theory of suicide is excluded by all the circumstances shown in the record as surrounding the domestic life of the deceased (Trans., pp. 205-234), by his professional standing (Trans., pp. 287, 290, 286, 274), by the circumstances attending the trip to Hope and the return up to the time of his disappearance, and by the presumption of law against suicide.

Standard Life and A. Ins. Co. v. Thorton, 100 Fed., 582.

Had the deceased gone off any other platform than one of the two open ones, he would have left the door open, and no effort was made by the defendant, whose employees had charge and continual supervision of the train, to show any such condition.

Death from assault by another person is excluded as follows: There is no evidence of enmity. There was no robbery; he carried little money and his watch, money and other property was on the body when found. (Trans., pp. 210-215, 714.) The wounds were not made by pistol, or sharp instrument, were very numerous and in number and character were such as would naturally be made by the body striking several times on the rocks, when thrown from the train. Defendant, who had the control, inspection and cleaning of defendant's cars, did not attempt to show any blood on any of defendant's

cars, which would naturally have been there from the many wounds on deceased had they been inflicted on the train. The law will not presume, for the benefit of defendant, that a crime has been committed on its train. To create such a defense it must prove the fact. The presumption is the other way.

Timson v. Moulton, 3 Cushing, 269.
Hewlett v. Hewlett, 4 Edw. Ch., 7.
Savier v. Chipman, 1 Mich., 116.

The body was in the following condition: The nose was mashed down to the face, the upper lip cut through, one eye destroyed and collapsed, the skull broken and a piece sheared off, being contained in a large flap of scalp partly detached from the head, fracture of the base of the skull, a wound in the scalp on the back of the head, both bones of the left forearm broken, the hand bruised and swollen, noticeable on the inside, contusions on the surface of the limbs, and a wound in the back of the chest to the left of the spinal column, ragged at the edges, which wound communicated with the interior of the chest cavity, and the lungs, heart or large blood vessels within the chest were ruptured. A piece of bone, together with some blood, was found on one of the rocks, showing how the wounds on the head were inflicted. The wound in the back was a three-cornered or triangular ragged wound, with the evidences of being punched by a rough blunt object, the triangular flap being pushed into the wound by the punching object. The object most accurately fitting this wound would be

a broken, rough, pointed triangular piece of rock. There was much broken rock on the ground. The terrific impact with the rocky ground of a body weighing over two hundred pounds, and hurled with the momentum of a heavy train running at fifty or sixty miles an hour, or less, would readily rupture the vital organs in the chest, though there were no external wound in the chest wall. These traumatic conditions caused death. (Trans., pp. 234-243, 265-269.)

Death from natural causes is excluded by the fact that the deceased was in perfect health (Trans., pp. 216, 268), and that immediately before his death he appeared in perfect health. (Trans., p. 95.)

Now, in addition to the foregoing facts, the jury had the following affirmative facts shown from which to find the manner of the death:

After passing Pack River trestle, and just before reaching the point where the body was found, which was only one mile and 3,480 feet from Pack River trestle (Trans., pp. 191, 192), deceased left the dining car with the cigars for himself and friend, going toward his friend and the smoking car. (Trans., pp. 480-484.) The car next the diner in front was the tourist sleeping car with two open unguarded platforms, over which deceased had to pass to reach his friend and the smoking car. Deceased was never seen on the train or alive after stepping from the diner toward these open platforms. The train was running over the track opposite where deceased was found in the neighborhood of sixty miles an hour, and, whatever the exact speed, so fast as to make the

cars lurch violently at the curves. The greater the speed and the sharper the curve the more violent the shock when the flanges of the wheels hit the sides of the rails and the train deviates from the straight line. (Trans., pp. 660-663.) This is common knowledge. Six degrees of curvature was the highest curvature between Hope and Spokane; the curve where the body was found was a six degree curve, very sharp. (Trans., pp. 303, 189, 190, map marked defendant's exhibit A 3.) It is usual when going fast to steady the train at curves and reduce the lurch by setting the air brake; the air brake was not set at this curve and the full force of the lurch remained unbroken and operated on the deceased unchecked. (Trans., pp. 351-354.)

The body was found 108 feet in a diagonal line from a point on the track where the indications on the ground showed it left the train, and 64 feet at a right angle from the convexity of the curve (Trans., pp. 142-151, 175-178, 187-191, plaintiff's exhibit "C 2"), showing the tremendous force communicated to deceased on the train and the great speed and lurch necessary to produce it. The tendency of the human body is to swing to the convex side of the curve when the train strikes the curve. (Trans., pp. 657-663.) The body was found on the convex side of the curve where it naturally would be under the working of this rule; and the hat, cuff and other property of deceased was scattered along on the same side of the track. The hat, being lighter than the body, had received less momentum from the train and was, therefore, east of the body and nearer the track. (Trans.,

pp. 144-149, plaintiff's exhibit "B 1," 186-196, exhibit "C 2," and photograph marked exhibit ....., 709-714, 732, 733.) The point on the track where the indications on the ground tended to show deceased left the train, was 125 feet from the beginning of the curve (Trans., pp. 188, 190, plaintiff's exhibit "C 2," 144-146); his hold was therefore broken and he was tossed into space within an instant after the wheels engaged the curve and the shock was communicated to the car. His broken left arm (Trans., p. 240), his left hand bruised on the inside (Trans., pp. 240, 210), the ring which was on the left hand and which was broken and scarred also on the inside (Trans., p. 210, plaintiff's exhibit "R"), and one cuff pulled off, point to an instant of struggle to maintain his hold before the impetus of the lurch of the train and the swing outward of the body disengaged his hand.

It is urged that deceased had a "sudden fit of illness" or "stubbed his toe." His actual good health and his appearance of it immediately before he was thrown from the train (Trans., p. 95) rebut both conjectures. But, assuming that he became sick, we are not aware that the duty of the carrier, to exercise the highest care for the safety of his passengers, extends to them only when in a state of perfect health. A state of sickness does not necessarily end in death. The presumption is in favor of the continuance of life. Thousands of men have lived useful and long lives after suffering such ills. Nor can a man be charged with contributory negligence, or with "assumption of the risk," through becoming sick, or through stubbing his toe. In the event of either

condition a gate or vestibule would have saved deceased from death on the rocks, as probably would have done a chain or bar.

It is submitted that the "inference sought is the only one which can fairly or reasonably be drawn from" the facts shown in this case, viz., that from an open platform, by the lurching of a car at a curve, the deceased was thrown and killed, and that the jury was fully warranted in so finding.

Cameron v. Great Northern Ry. Co., 77 N. W. Rep., 1020.
Texas & Pacific R. Co. v. Gentry, 163 U. S., 353.
Felton v. Newport, 105 Fed. Rep., 332.
Home Benefit Ass'n v. Sargent, 142 U. S., 691.
McAfee v. Huidekoper (D. C. app.), 34 L. R. A., 720.

The demand for a peremptory instruction, which raises whatever questions this court can consider relative to the sufficiency of the evidence, is equivalent to a demurrer to the evidence and admits all the facts plaintiff's evidence tended to show, as the high speed, the violent lurching at the curves, the points on the ground where deceased struck and lay, and the distances, etc.

Parks v. Ross, 11 How., 373.

"The case should not have been withdrawn from the "jury unless the conclusion followed, as a matter of "law, that no recovery could be had upon any view

"which could properly be taken of the facts the evi-
"dence tended to establish."

Tex. & Pac. R. Co. v. Cox, 145 U. S., 593.
Dunlap v. Northeastern R. Co., 130 U. S., 649.
Standard & Life Accident Ins. Co. v. Thornton, 100 Fed. Rep., 582.

But it is not within the province of the court to review the evidence in the record, to determine whether or not the inference drawn by the jury from the evidence was a reasonable one, or the only one that might fairly and reasonably be drawn, or to consider the weight of evidence, or to determine whether the jury was warranted in reaching the conclusion that the defendant caused the death of the deceased. The great speed and lurching, the open platform, the deceased being last seen stepping toward it, the sharp curve and the relation of the body to it, was, by itself, certainly *some* evidence tending to show the way the deceased was killed irrespective of the balance of the evidence on this point.

"It is not for us to decide that the jury brought in a
"wrong verdict under a correct charge, if the record
"shows, as it does, that there was *some* evidence to
"support the finding which was made."

Chicago & N. Ry. Co. v. Ohle, 117 U. S., 123.
Hepburn v. Dubois, 12 Pet., 375.
Zellers Lessee v. Eckert, 4 How., 289.
U. S. Express Co. v. Ware, 20 Wall., 543.
Barreda v. Silsbee, 21 How., 146.
Gregg v. Moss, 14 Wall., 564.

The impropriety of the court interfering with the verdict of the jury, is emphasized by the fact that a motion for a new trial was made and argued below, upon the ground of insufficient evidence to support the verdict, and the motion was overruled by the judge who saw and heard the witnesses testify.

Miller v. Bean, 13 Wash., 516.
McDougal v. Walling, 19 Wash., 80.

V.

Petitioner's Negligence.

ABSENCE OF VESTIBULE APPLIANCE.

It had been long the custom of the defendant to carry on its through trains, for the use and convenience of passengers, a dining car where meals were served, and where also cigars and liquors were served to those wishing them. (Trans., pp. 479, 481, 58, par. 4.) This car was advertised as being carried on these trains for the use of passengers. (Trans., pp. 271-273, 280-283.) The conveniences of the dining car were extended to the passengers at all hours, whether at meal-time or otherwise, and whether the train was in motion or otherwise, sales being made to them at all times except late in the evening when the train crew needed the car for sleep, and the passengers commonly and customarily used this car at all hours, going to and from it without restriction or interference of any kind whatsoever. (Trans., pp. 155, 275, 276, 277, 278, 182, 183, 290, 291.)

The deceased was acting upon the invitation of the defendant, held out to its passengers by prolonged custom and practice, and by its advertisements, and using the dining car for the very purpose for which it was carried, and in the appropriate and long established manner.

At a time when, in the development of railway carriage, there was no dining car carried on the train, and the train stopped at eating stations, and passengers were not invited or expected to pass from car to car, but, on the contrary, were warned to keep off the platforms, the cars then used, the platforms being left unguarded, were sufficiently safe in connection with the method of travel then in vogue.

When the carrier, however, in keeping up with modern progress, adopted a different or changed method or system of transportation, it became obligatory upon him to make the additional means adopted by him to carry on the changed system or method such that they could be used with safety by the passengers for whose use they were employed. Having adopted the method of feeding the passengers upon the train, and having adopted and put in use a dining car for that purpose, and having arranged for the passengers in all the other cars to pass to and from it, in order to use it, at all hours whether the train was moving or otherwise, it became the unquestionable duty of the carrier to make such use of it by the passengers safe. It undertook to carry them while in the passenger car, on the platforms going to the dining car, and in the dining car. Its duty was to

carry them, *wherever* it undertook to carry them, safely. To put it differently, the carrier, after the adoption of the dining car system, carried its passengers on a train in contradistinction to carrying them, as theretofore, on a car. When passengers were riding, therefore, on the train, in the manner provided for by the carrier, it became the duty of the carrier to make the train safe for the purposes to which he devoted it.

The dining car was carried in front of the Pullman sleeper, behind all the other cars on the train. The tourist sleeping car was immediately in front of it. (Trans., pp. 386, 84-87.) All of the passengers on the cars in front of the diner, were compelled, in reaching it, to pass over one or both of the unvestibuled and unguarded platforms, of the tourist sleeping car. It is patent to a very low order of understanding that these platforms, over which passengers passed while the train was in motion to reach the dining car, would be much safer if enclosed at the sides by means of the vestibuling device, than when open at the sides. The vestibuling device makes the train, so far as communication with the outer world is concerned, one car from end to end, and renders impossible falling therefrom. Disputing that very great additional safety lies in the vestibuling device to passengers passing to and from the dining car, is not compatible with reason, and even defendant's witnesses were compelled, by force of persistent cross-examination, to admit it. (Trans., pp. 156, 157, 84-87, 657, 535, 536, 547, 571, 572, 588, 589, 602, 617, 624, 625, 639, 643, 644.)

This vestibuling device had been in known practical

use upon railway passenger cars and trains for certainly six or seven years prior to the 13th day of November, 1898 (Trans., pp. 156, 528, 544, 554, 555, 581, 584, 598, 608, 609, 59, par. 5), and was in known practical use at that time, and was in use and operation on this very train on all the passenger cars with the exception of the tourist sleeping car. (Trans., pp. 84-87.) Its common and established use and steady and continuous adoption, and its patent effect in protecting the passenger in passing from car to car had, at the date of this disaster, long taken it out of the realm of uncertainty and speculation as a safety-adding device to passenger travel.

The railway passenger carrier is bound to use on its cars the best appliances in known practical use that increase the security of the passengers; and it is bound to adopt the best means or appliances in known practical use which increase the safety of the passenger, in view of the method or system of transportation employed by it—that is, in the case at bar, the appliances giving the most safety in using the dining car.

N. J. R. R. & Trans. Co. v. Pollard, 22 Wall., 341.
Pa. Co. v. Roy, 102 U. S., 451.
Treadwell v. Whittier, 80 Cal., 592-593.
Caldwell v. N. J. Steamboat Co., 47 N. Y., 282.
Meier v. Pa. R. Co., 64 Pa. St., 225.
Hegeman v. West R. Corp., 13 N. Y., 9.

It is not possible to question the application of this rule in the case at bar. The rule might be evaded possibly in other cases by showing that the appliance did not add to

the safety of the passenger, or by showing that, by the exercise of the greatest diligence, it was a physical impossibility for the carrier to have adopted the appliance. Neither excuse exists in the case at bar. The additional safety from the appliance is admitted by all. The fact that the deceased would have been alive today had it been in operation, cannot be questioned, and Mr. Gilbert, the superintendent of the defendant company at Spokane, himself admitted the additional safety (Trans., p. 657), and his testimony clearly shows that the *convenience* of the defendant was the only reason why it had not been put upon the tourist sleeping cars. (Trans., pp. 653-657.) Substantially the only defense on this point attempted was that other roads in the country were guilty of the same negligence. (Trans., pp. 522-644.)

ABSENCE OF ANY GUARD TO PLATFORMS OF TOURIST CAR.

But, irrespective of this time-honored rule requiring the adoption of safety adding appliances, the action of the defendant in sandwiching the tourist sleeping car in the train so as to compel passengers of necessity to pass over its open platforms in going to and from the dining car, is glaring negligence. All kinds of people used the dining car, children, old people and women. The record shows it was no unusual thing to go around six degree curves at fifty miles an hour. (Trans., pp. 355, 361.) It further shows that when the flanges of the wheels of the car strike the side of the rail at the beginning of a curve there is a jar or jolt, and that the greater the speed the greater the jar or jolt of the car

(Trans., pp. 660-663, 105, 118, 119, 131, 426), and the tendency of the human body to swing outward from the train toward the convexity of the curve as the train rounds it is common knowledge.

We have here a narrow bridge from car to car, not stationary, but oscillating, and more or less unsteady and uncertain to the foot, particularly as cars strike the beginning of curves. If this narrow bridge were stationary over a chasm in the earth, and a fall from it would mean death or serious injury upon the rocks below, to leave it unrailed or unguarded on both sides, all conditions of people having to pass over it, immediately strikes the mind as negligence showing a reckless indifference to human life and limb; but in the case of this unsteady bridge, unguarded at the sides, to which there is communicated from time to time a sudden jar or jolt, by the wheels hitting the curve, and upon which the equilibrium of the passenger is further overthrown outward from the convexity of the curve, any human being, child or adult, railroad man, or otherwise, sees, and must see clearly, the likelihood or probability of one passing at such a time falling and being mangled or killed. The lowest order of foresight and diligence for the care and safety of the passenger would foresee and guard against this danger.

The rectifying of this dangerous condition would have been a matter of extreme simplicity with insignificant expense of time, labor or money. An iron chain, of the value of a few cents, attached to the end of the body of the car and stretched across the side of the platform to

the railing at the end of the platform, would have saved this life. A wooden rail, which the average man could make with a jack knife and, with a hinge, two screws, a hook and a screw driver, attach to the end of the body of the car and let down across the side of the platform to the iron rail at the end of the platform, would have saved this life. A farmer sees a broken place in his fence and knows that his stock may get through into his neighbor's turnips, and knows that he will be guilty of negligence if he allows it to go unrectified, and he takes a piece of fence rail, or old board, and fills the hole. The care and the means resorted to by the farmer to avoid negligence on his part, and to save his neighbor's turnips, if resorted to to fill the hole in the side of this train, would have saved this life. Any of these simple means could have been applied within fifteen minutes at any station at which the train stopped after leaving St. Paul, or could have been applied while the train was in motion.

The record discloses that there are in known practical use, to enclose platforms of passenger cars, light iron gates, open work, and, in the nature of things, cheap, which are secured on to the end of the car, and very little expense, and very little time and insignificant labor would have applied these gates to that tourist car, and this life would have been saved. (Trans., pp. 589, 243-251.)

The tourist sleeping car could readily have been carried at the rear of the train, or in front of all the other passenger cars (Trans., pp. 531, 532, 554, 249),

and thus the passengers in all the other cars on this train would have been able to pass to the dining car without passing over the open platforms of the tourist car, and if this had been done the deceased would not have been killed. It is true that those in the tourist sleeping car would still have been exposed to danger if they went to the dining car, but comparatively few of them used the dining car, the tourist sleeping car being fitted with a cooking range, and arranged so that those thus carried can feed themselves in that car (Trans., p. 432); and in any event they would have but one open platform to cross, while with the tourist car in the middle of the train, all passengers in front of it would have to cross two.

In view of these facts, the defendant's contention that, while having arranged for passengers to pass to and fro over these platforms, and while knowing that they were so passing, it was no negligence on its part not to resort to any of the simple means that would have made the way to and from the dining car safe, is utterly untenable.

HIGH AND DANGEROUS SPEED.

The train was three hours and ten minutes late leaving Hope. (Train schedule, Ex. A6, and Trans., p. 312.) The usual or schedule time for this train from Hope to Spokane was two hours and twenty-five minutes. (Train schedule, Ex. A6, Trans., pp. 258-9.) The actual time consumed by it on the afternoon in question was one hour and fifty-five minutes, thirty minutes of the delay being made up in running the eighty-five miles

and a fraction between Hope and Spokane. It left Hope at 4.15 P. M. and reached Spokane at 6.10 P. M. (Trans., pp. 312, 323.) The distance between Hope and Sand Point, coming west, is sixteen miles. (Trans., p. 301.) The ordinary or schedule time for running this sixteen miles was thirty-five minutes. (Train schedule, Ex. A6.) This distance was run on the afternoon in question in twenty-four minutes (Trans., pp. 321, 322, 516, Train sheet, defendant's Ex. 2), or at an *average* of forty miles an hour from the instant of starting to the instant of stopping. Thus eleven minutes of the thirty minutes made up in the eighty-nine mile run were made up in this first sixteen miles. The speed was moderate out through the yards at Hope, and down to the east end of the Pack River trestle, a distance of about four miles. (Trans., pp. 104, 105, 116.) The train went at moderate speed over the trestle, 7,100 feet long (Trans., p. 300), until toward the western end. (Trans. pp. 315, 116, 104, 105.) There is an upgrade about two miles long just west of Oden, a station about midway between Hope and Sand Point. (Trans., pp. 303, 304.) The track from the west end of the Pack River trestle to Oden, which includes the point where the body was found, is substantially a dead level and was in perfect condition. (Trans., pp. 303, 304, 305, 730, 715, 716, 328.) The engine in use was capable of running one hundred miles an hour and had drawn a train at a speed of ninety-three miles an hour. (Trans., pp. 343, 344.) The engineer had, on previous occasions, driven his train over that piece of track and around the very curve

where the deceased was thrown off, by his own admission, as many as three hundred times at fifty to fifty-five miles an hour. (Trans., pp. 355, 361, 328.) He had often run from Hope to Sand Point in less time than on this occasion, and had once driven a passenger train between these points at an average of nearly sixty miles an hour from the instant of starting. (Trans., pp. 347, 348.) The reason attempted to be shown to support his statement that on this particular occasion he was going, at the identical point where the deceased was thrown off, at not over thirty-five miles an hour was that this dead level track had curves in it. (Trans., pp. 310, 311, 112.) From the top of the hill beyond Oden he increased his speed rapidly, by his own admission, on a down grade, over track containing curves, from forty-three or forty-five miles on up to sixty between there and Sand Point. (Trans., pp. 340-343, 303, 304, 299-301, map marked defendant's Ex. A3.)

Following these most significant facts, the government railway mail clerk, who had at the time of this disaster been in the government railway mail service for nearly three years, and at the time of the disaster had been running on the through train between Hope and Spokane for about eight months, and who was on the train in question, still in the government service and in the mail car, testified that high speed began about the west end of the Pack River trestle, and that, as the train left the Pack River trestle, it was going at the rate of fifty miles an hour, and that the speed was rapidly increased from that point until, by the time it

had gone a mile and a half west of the Pack River station, the speed had reached sixty miles an hour. (Trans., pp. 117, 118.) And he says further regarding the speed over this piece of track from which the deceased was thrown: "I never rode, before nor since, anything like that fast." (Trans., p. 120.) He further states that, from the excessive speed, the car in which he rode so lurched and oscillated at the curves that he was unable to perform his ordinary work, and was compelled to hold on to the car to keep from being thrown from side to side. (Trans., pp. 118-120.) He further says that in the run over this piece of track the car swung so violently that the mail bags piled on either side fell to the floor of the car. (Trans., p. 119.) This witness is a man of long experience on fast trains, holding a position of trust under the government, and we call attention to the whole of his testimony. (Trans., pp. 112-127.)

The witness Wickersham was in the employ of the Northern News Company, selling its goods on the Northern Pacific Railway, running between Helena and Spokane, and was on the train in question. (Trans., p. 127.) Just after the train left Hope he was warned by the brakeman that the train was going to make an unusually fast run from Hope to Spokane, and that it would not be safe for him to go from car to car and instead of proceeding with his business, on account of this warning, he sat down in the smoking car. (Trans., pp. 128, 129, 139, 140.) That within a mile west of the trestle he served a passenger in the smoking car with fruit, and the shaking of the car going about the curves

was so great as to make him sick. He had a long experience in riding on these trains, making ten trips a month from Helena to Spokane, and had been in the employ of the Northern News Company for over two years. (Trans., pp. 130, 131.) This witness further states that at the time he was serving the passenger in the smoking car, and was made sick, the train was running fifty-five or sixty miles an hour, and that over this piece of track from the trestle west to Oden it was usual, when the trains were late, to run fast in making up time, because the road there was smooth and level, an exceptionally good piece of road (Trans., pp. 132, 133), but that this trip over that part of the road, on the 13th day of November, 1898, was the fastest he had ever made there. (Trans., p. 133.) Owing to the speed and the motion of the train over curves, this witness, whose custom it was to go through the train after leaving Hope (Trans., p. 128), did not leave the smoking car between Hope and Sand Point. (Trans., p. 134.)

Mr. Jeannot, a merchant of Hope, Idaho, was on this train in the smoking car, and during the eight years of his residence in Hope had traveled to and from Spokane, over the Northern Pacific road, twice a month. (Trans., pp. 99, 100.) He noticed the increase of speed within half a mile after the train left the west end of the Pack River trestle, and states that within a mile west of the trestle the train was going, in his opinion, sixty miles an hour. (Trans., pp. 104-106.)

Mr. Gabbert, a mining man, who had traveled considerably over the Northern Pacific line, testified that

he was thrown against the end of the seat in which he sat by the swinging and lurching of the car, and that the speed was fast a short time after the deceased left the smoking car to go to the dining car. (Trans., pp. 93-95.)

If the positive testimony of these four disinterested witnesses, as to the high rate of speed at which the train was running and the extreme commotion in the train which this high speed produced along the track between the Pack River trestle and Oden, and at the point where the deceased was thrown from the train, be considered, together with the foregoing additional significant facts, it will be at once seen that the jury had ample evidence upon which to find that the train, at the point where the deceased was thrown off, was running at a very high and unusual rate of speed.

Whether a given rate of speed is negligence depends on the conditions under which it is maintained.

The defendant was running in the middle of its train, a car with open, unguarded platforms, with a standing invitation to the passengers to go over those open platforms at will to the dining car, and was charged with knowledge that at any moment such open platforms might be occupied by a passenger passing to such dining car. Instead of moderating its speed over the curves, that the lurching of the car might not throw such passenger from the open platforms, it plunged its train into this crooked track at an unusually high speed, so great that two experienced railroad men, to prevent themselves from being thrown or injured by the lurching of the cars at the curves, refrained from doing their

customary work, and the record discloses no warning given to the passengers of the intended high speed. Very ordinary care, in view of the actual condition permitted and suffered by the defendant of open platforms, and the passing thereover at will by the passengers, and the crooked track, demanded a slow rate of running. To run, under these circumstances, at high speed, such as produced the commotion noticeable in this train was, we submit, most pronounced negligence.

FAILURE TO USE THE AIR BRAKE.

Finally, on the question of negligence; putting on the air brakes, or "touching the air" as it is called, steadies the train going around a curve—makes the hind cars drag on the front of the train and tends to make the train a rigid whole. It takes the slack out of the couplings, puts them on the stretch, and so prevents lateral swaying and oscillation or lurching of individual cars.

The air brake was not put on at the particular curve where the deceased was thrown off, and the jolt or swing of the car he was on at that point was in no way controlled, though the means were at hand for that purpose, and the engineer was charged with knowledge that a passenger might be on the open platform at that spot. (Trans., pp. 351-354.)

A railroad company cannot act in disregard of the actual state of things which it permits or suffers. Its exhibition of care must be increased to meet the demands of such a state of things.

Lynn v. So. Pac. Co., 103 Cal., 7; 24 L. R. A., 710.

VI.

The Instruction that the Defendant Company owed to Plaintiffs the same duty it owed the Public Generally (Trans., pp. 811. 812).

The duty of the defendant, which all of these matters of negligence violated, is as follows:

The undertaking and liability of the railway carrier of passengers goes to the extent that the carrier and its agents shall, as far as human care and foresight can go, transport them safely. Such carrier must prevent injuries to passengers in the course of their transportation which may be avoided or guarded against by the exercise, upon the part of the carrier, of extraordinary vigilance and foresight, aided by the highest care. And this caution, foresight and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. For the slightest negligence or fault in this regard the carrier is liable.

Pa. Co. v. Roy, 102 U. S., 451.
Ind. & St. L. R. R. Co. v. Horst, 93 U. S., 291.
Trumbull v. Erickson, 97 Fed., 894.
Phila. & Reading R. Co. v. Derby, 14 How., 485.
Steamboat New World v. King, 16 How., 469.

That the duty which the carrier is under, to observe this rule and exercise the care exacted, is a public duty, a duty which he owes to the public, and does not rest on contract, is undoubtedly true.

Grand Trunk Ry. v. Stevens, 95 U. S., 655.
Chi. M. & St. P. R. Co. v. Solan, 169 U. S., 113.
Munn v. People of Illinois, 94 U. S., 113.
Phila. & Read. R. R. Co. v. Derby, 14 How., 468.

There was no possible injury to the defendant in the court's stating that it was the public duty which the carrier was bound to perform in this case, and not the duty it owed the deceased, inasmuch as the duty in regard to care owed by the carrier to the public and to the deceased was absolutely identical. And inasmuch as the carrier owes to the passenger the *highest* degree of care, any implication that the case might rest on other relations than those of passenger and carrier could not be to defendant's prejudice. The carrier's duty in regard to the care demanded in this peculiar case was very carefully and plainly defined by the court.

If there was any ambiguity in the instructions, the defendant should have had it corrected.

Ind. etc. R. Co. v. Horst, 93 U. S., 291.
Flanders v. Tweed, 16 Wall., 504.
Balt. & P. R. Co. v. Mackey, 157 U. S., 86.

Respectfully submitted,

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